IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MOUNTBATTEN SURETY COMPANY, INC.	:	CIVIL ACTION
v.	:	
AFNY, INC.	:	
v.	:	
FIDELITY AND DEPOSIT COMPANY OF MARYLAND	:	NO. 99-2687

MEMORANDUM

Dalzell, J. April 11, 2000

This case stems from the termination of the business relationships between, on the one hand, AFNY, Inc., and, on the other, the Mountbatten Surety Company and Fidelity and Deposit Company of Maryland. Before us now are Mountbatten and F&D's motions for summary judgment on all claims and counterclaims.

I. Background

A. Facts[1]

Mountbatten is a surety company whose business it is to issue bonds to cover various risks.[2] AFNY is a surety bond wholesaler, which acts in part as a conduit between the brokers

[1]The fact set laid out below includes some, but not all, of the undisputed facts, and is meant to provide a framework in which to place the more specific factual issues, which are discussed more fully, as necessary, in the Analysis section below.

[2]These risks include those associated with various construction projects, and bond amounts range from a few thousand to several million dollars. Premiums for such bonds appear to be in the range of fifteen to thirty dollars per thousand.

of those who wish to be insured[3] and surety companies such as Mountbatten. In particular, AFNY and Mountbatten work in the "non-standard" surety market, in which greater risks are insured for commensurately higher premiums. AFNY, as a wholesaler, makes its money from commissions[4] on the premiums paid on the bonds issued through it.

AFNY began writing bond business with Mountbatten in 1997, and this relationship was formalized by an Agency Agreement dated March 11, 1998 (the "Mountbatten Agreement"). Under the Mountbatten Agreement, AFNY was appointed Mountbatten's agent to solicit business for Mountbatten and to collect premiums,[5] in exchange for which AFNY would receive a specified commission on the bond premiums[6] as well as an additional contingency payment based both on the total annual premiums generated and the "loss ratio" of the business written through AFNY.[7] The Mountbatten

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[3]These brokers may also be referred to below as "producers." AFNY has relationships with "a few hundred" producers, Ex. 2, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., Dep. of Wayne Price at 81 (hereinafter "Dep. of Wayne Price").

[4]These may be in the neighborhood of thirty to thirty-five percent.

[5]On the other hand, the Mountbatten Agreement expressly stated that AFNY had not authority to bind Mountbatten and that all bonds written had to be within the scope of a separately-executed power of attorney.

[6]The exact level of the commission is fixed by a separate document, the "Rate and Commission Schedule"; for 1998 the commission was thirty percent.

[7]By 1998, Mountbatten did business with about one
(continued...)

Agreement also contained a provision that allowed either party to terminate the agreement for convenience after at least thirty days written notice.[8]

In August, 1998, F&D acquired Mountbatten, though Mountbatten continued to act independently as a wholly-owned subsidiary.[9] In December, 1998, F&D executed powers of attorney to allow AFNY, upon receipt of advance approval by Mountbatten or F&D, to execute bonds on behalf of F&D, and on January 4, 1999, F&D and AFNY signed an Agency Agreement, retroactive to December 18, 1998 (the "F&D Agreement"), which gave AFNY authority to solicit bond applications and receive premiums for F&D in exchange for a commission on such premiums. The F&D Agreement, too, had a provision allowing termination at any time with ninety days' written notice.[10]

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[7](...continued)
hundred active agents, and AFNY was one of Mountbatten's top ten producing agents in terms of premiums generated, see Ex. 1, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., Dep. of Rochelle Musto at 45.

[8]Paragraph 13 of the Mountbatten Agreement states: **"Termination for Convenience**: Either party may terminate this Agreement without cause by either party giving to the other party at least 30 days prior written notice." Ex. A, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. ¶ 13.

[9]Mountbatten and F&D have engaged separate counsel for this litigation and have filed independent pleadings.

[10]Paragraph 21 of the F&D Agreement states: "This Agreement and/or any Specific Authorization may be terminated by either party at any time upon ninety (90) days written notice, or the required statutory notice, if it be longer, to the other." Ex. E, Mem. of Law in Opp'n to F&D's Mot. for Summ. J. ¶ 21.

In a letter dated January 19, 1999, Mountbatten informed AFNY that it was terminating the Mountbatten Agreement, effective thirty days from the date of the letter. Mountbatten further stated that

> During this thirty (30) day period The Mountbatten Surety Company, Inc. will not be accepting any new business, but will continue to service the existing accounts handled through your agency. All agency lines are cancelled effective immediately. Any approvals for bid or final bonds must be given by a home office underwriter, in writing, prior to being released from your office.

Ex. H, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. This letter also requested that all supplies[11] belonging to both Mountbatten and F&D that had been entrusted to AFNY be returned at the end of the thirty day period.[12]

In a letter dated March 11, 1999, F&D informed AFNY that it was terminating the F&D Agreement effective ninety days from the date of that letter. The letter also stated: "During this ninety (90) day period our company will not be accepting any new business, but will continue to service existing accounts

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[11]To include, inter alia, all powers of attorney, seals, stamps, logs, forms, and software. Stamps and seals may be necessary for an agent to physically execute a bond on behalf of the surety, see Ex. 2, Mem. of Law in Opp'n to F&D's Mot. for Summ. J., Dep. of Tyrone Smith at 25 (hereinafter "Dep. of Tyrone Smith").

[12]Apparently, during a phone conversation in early 1999, Tom Kay of Mountbatten informed Tyrone Smith of F&D that Mountbatten intended to end its agency relationship with AFNY, and asked Smith if Mountbatten should also ask for the return of the F&D supplies AFNY held. Smith told Kay that Mountbatten should do so, see Dep. of Tyrone Smith at 41-42.

handled through your agency." Ex. G, Mem. of Law in Opp'n to F&D's Mot. for Summ. J. Enclosed with the letter were revocations of the power of attorney that F&D had previously given to AFNY.

B. Procedural History

On May 26, 1999, Mountbatten filed its Complaint, including claims of breach of contract (Count I) and conversion (Count II) alleging that AFNY had failed to remit to Mountbatten premium payments that were due for bonds issued through AFNY.[13] AFNY[14] counterclaimed against Mountbatten and impleaded F&D, alleging, inter alia, breach of contract, unjust enrichment, misrepresentation, and misappropriation of trade secrets. The factual thrust of these allegations was: (1) Mountbatten's letter of January 19, 1999 was in fact an immediate termination and Mountbatten had therefore failed to provide proper termination notice, and (2) Mountbatten had wrongly caused AFNY to reveal a list of the producers with which it worked and had done so for the purpose of taking business from these producers for itself.

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[13]We have jurisdiction over this case by virtue of diversity, as Mountbatten is a citizen of Pennsylvania, AFNY is a citizen of New York, and F&D is a citizen of Maryland.

[14]Originally, these counterclaims were alleged in the form of a class action complaint filed on behalf of all bond wholesalers who had, like AFNY, been terminated by Mountbatten after its acquisition by F&D. Ultimately, following the Rule 16 conference, AFNY filed a Second Amended Answer and Counterclaim that deleted the class allegations. It is also worth noting that at the Rule 16 conference the parties agreed to submit this case to court-sponsored arbitration without regard to the arbitral limit of $150,000 provided in our Local Rules.

AFNY alleged that F&D was aware of and encouraged these actions.

F&D itself then counterclaimed against AFNY, alleging breach of contract (Count I) and conversion (Count II) on the basis that AFNY had failed to remit to F&D premium payments that were due on F&D bonds that had been written through AFNY.

The parties then engaged in discovery.[15] Following the close of discovery, AFNY moved to amend its counterclaims against both Mountbatten and F&D in order to conform with the evidence as found through discovery,[16] a motion we granted with respect to Mountbatten, but denied with respect to F&D.[17] As a result of the consequent amendments, we have pending the following counterclaims of AFNY against Mountbatten: breach of contract (Count I), misrepresentation (Count II), misappropriation of trade secrets (Count III), tortious interference with contractual relations (Count IV), tortious interference with prospective contractual relations (Count V). The following counterclaims remain extant against F&D: misappropriation of trade secrets

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[15]We note that discovery in this case was both longer than one would expect for a case of this nature -- over three months -- and less cooperative than one would expect -- our services were required to resolve four separate discovery disputes between AFNY and Mountbatten.

[16]The new factual allegations spurred by evidence uncovered during discovery include that Mountbatten encouraged F&D to terminate its relationship with AFNY and that Mountbatten sought to impair AFNY's ability to conduct business by requesting the return of Mountbatten's and F&D's supplies.

[17]As AFNY's motion to amend its counterclaims was filed only four days before summary judgment motions were due, we afforded the parties an opportunity to file supplemental summary judgment briefs in light of the new counterclaim allegations.

(Count III), tortious interference with contractual relations (Count VI), and tortious interference with prospective contractual relations (Count VII).[18]

Mountbatten and F&D have each moved for summary judgment on their claims against AFNY and AFNY's counterclaims against them.[19]

II. Analysis[20]

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[18]In its motion to amend counterclaims, AFNY sought to delete all of these counterclaims against F&D and replace them with a single count of breach of contract on the grounds that such amendment was needed to conform the counterclaims to the evidence. We denied the motion on the basis of undue delay, because the putative new claim was based upon information and documents long available to AFNY. In line with its representation in the motion to amend, and as we will discuss below, AFNY does not dispute F&D's contention that no disputed issue of material fact exists to prevent judgment in F&D's favor on the extant counterclaims.

[19]As we begin our analysis, we observe that, including supplemental pleadings filed after the motion to amend counterclaims was granted, we have the benefit of over one hundred-eighty pages of pleadings from the parties on the issues at hand, in addition, of course, to numerous exhibits.

[20]A summary judgment motion should only be granted if we conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, see id. at 587. Once the moving party has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial,'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

The mere existence of some evidence in support of the

(continued...)

A. Mountbatten's Claims Against AFNY

1. Breach of Contract

"A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999).[21] Here, there is no dispute that these elements, as such, are met. Mountbatten has presented evidence, which AFNY does not dispute, that there was an agency contract between Mountbatten and AFNY,[22] that this contract required AFNY to remit to Mountbatten the bond premiums, net of AFNY's commissions,[23] and that AFNY has retained some of these premiums instead of paying them over to Mountbatten.[24]

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[20](...continued)
nonmoving party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, we must "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

[21]Mountbatten and AFNY agree that Pennsylvania law applies to the Mountbatten Agreement, in accordance with a choice of law provision in paragraph 21 of that Agreement.

[22]Both AFNY and Mountbatten have attached this Agreement as an exhibit to their pleadings, and neither claim that it was not valid.

[23]See Ex. A, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J., Mountbatten Agreement ¶ 5.

[24]See Dep. of Wayne Price at 51 (acknowledging as correct a statement of account showing net premiums owed to
(continued...)

Instead of disputing these elements, AFNY argues that there exist disputed issues of material fact with respect to three defenses to the breach of contract claim: (1) Mountbatten itself first materially breached the contract by failing to give thirty days written notice of termination; (2) Mountbatten itself first materially breached the contract by violating the implicit covenant of good faith and fair dealing; and (3) there was in fact no breach of the contract because Mountbatten had waived its ability to enforce the payment provision of the contract.

A party that has materially breached a contract cannot demand that the other party conform to that agreement, see, e.g., Bohm v. Commerce Union Bank, 794 F. Supp. 158, 162 (M.D. Pa. 1992). Here, AFNY argues that there is at least a dispute of material fact over the question of whether Mountbatten first materially breached the Agreement.[25]

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[24](...continued)
Mountbatten). On the other hand, AFNY does allege that course of performance under the contract shows that Mountbatten waived the contractual requirement for payment within thirty days of invoice, and we discuss this below.

[25]The "materiality" of a breach is determined through consideration of several factors:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to
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> (continued...)

a. Mountbatten's Alleged Failure to Provide Proper Notice

The first material breach that AFNY alleges is that Mountbatten failed to give proper notice for the termination of the Agreement. AFNY argues that the January 19, 1999 letter effectively terminated the Agreement immediately, because it stated that no new accounts would be serviced, that agency lines would be immediately canceled, and that AFNY was required to have express approval for some bonds. AFNY offers the testimony of AFNY principals Wayne Price and Mary Price, who state that following January 19, 1999 Mountbatten declined to issue bonds on accounts that were already existing, see Dep. of Wayne Price at 81-82, and that the issuance of new bonds is considered to be part of servicing an existing account, see Ex. 4, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., Dep. of Mary Price at 34. AFNY argues that the revocation of the benefits of the contract (to include to prohibition on new accounts, the cancellation of agency lines, and the requirement for special approval) and the failure to issue new bonds were a breach of the

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[25](...continued)
perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Gray v. Gray, 671 A.2d 1166, 1172 (Pa. Super. 1996) (quoting Restatement (Second) of Contracts § 241).

contract and that there exists an issue of material fact over their materiality, see Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 11-12.

In deciding whether this argument suffices to prevent summary judgment on the breach of contract claim, we must first consider whether these actions, in the first instance, make out a breach of the contract provisions.[26] After considering carefully the contract provisions, we find that, even taking as true AFNY's version of the letter's effects, the letter of January 19, 1999 was not a breach of the Mountbatten Agreement.

We first note that, as laid out in the margin above, the Mountbatten Agreement itself provides for the contract's termination "for convenience"[27] of a party, see Mountbatten Agreement ¶ 13, and that there is nothing per se impermissible about contractual provisions allowing such terminations without cause, see Amoco Oil Co. v. Burns, 437 A.2d 381, 383-84 (Pa. 1981). Moreover, the Mountbatten Agreement grants only very limited powers to AFNY as Mountbatten's agent. Under the Agreement, AFNY is permitted to "solicit business" and to "collect and give receipts for premiums or fees due", Mountbatten Agreement ¶ 1. However, the Agreement gives AFNY absolutely no powers actually to write or issue any bonds, nor does it contain

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[26]That is, prior to concerning ourselves with the materiality of the alleged breach, we must decide if there was a breach.

[27]Which is to say "without cause".

any representation regarding the standards under which any solicited bonds might or might not be approved by Mountbatten. Thus, although the letter of January 19, 1999 gave AFNY notice that the business relationship between AFNY and Mountbatten would be more limited in the following thirty days -- the days preceding termination -- this more limited relationship did not breach the very limited agency agreement into which the parties had entered. In particular, for example, Mountbatten's refusal to issue bonds during that thirty days can't be a violation of the Agreement where Mountbatten never committed itself in the Agreement to write any bonds.[28] Similarly, to the extent that the letter called for the return of the supplies that would allow AFNY to execute bonds on behalf of Mountbatten, AFNY had no rights under the Agreement to have that power. While the letter of January 19, 1999 may have ended several aspects of the relationship between Mountbatten and AFNY, it did not violate the agency Agreement.[29]

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[28]AFNY argues that the while the letter of termination dated January 19, 1999 stated that Mountbatten would continue to service existing accounts, Mountbatten in fact refused to issue new bonds on these existing accounts when requested to do so by AFNY, and that this is therefore a breach of contract, see Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 25-26. Even assuming Mountbatten behaved in this way, such a refusal, as discussed in the text, cannot violate the Agreement where that document didn't commit Mountbatten to write any bonds.

[29]Clearly, the Agreement did not delineate the entire relationship between Mountbatten and AFNY, since the Agreement itself refers to the potential existence of other, separate, instruments such as powers-of-attorney which were evidently to be executed at the parties' discretion.

b. Mountbatten's Alleged Breach of the Duty of Good Faith

Mountbatten's second material breach, argues AFNY, was of the implied covenant of good faith and fair dealing, and AFNY discusses a number of Mountbatten's actions that violated this standard.

The first of these has to do with a list of AFNY's producers that was provided to Mountbatten. It does not appear to be disputed that Mountbatten indeed requested a list of the producers who worked with AFNY, see Ex. 5 Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., Dep. of Tom Kay at 106. AFNY argues that while the list was solicited on the representation that Mountbatten wanted to avoid competing with AFNY's clients[30], see Dep. of Wayne Price at 61,[31] that instead Mountbatten independently contacted these producers, see Aff. of Wayne Price ¶ 21. AFNY also claims that Mountbatten staff members discussed terminating AFNY prior to the January 19, 1999 letter, and despite these conversations Mountbatten continued to receive business AFNY submitted up to and including January 19, 1999. Also, the fact that AFNY received powers of attorney from F&D in December, 1999 "encouraged" AFNY that its relationship with Mountbatten would continue, Mem. of Law in Opp'n to Mountbatten's

[30]That is, that Mountbatten was going to independently solicit business and wanted to avoid doing so with the same producers who were already working with AFNY.

[31]Tom Kay, one of Mountbatten's principals, states that this was the reason the list was solicited, see Dep. of Tom Kay at 106.

Mot. for Summ. J. at 13. Thus, the "sudden termination" was not within AFNY's "justified expectations" and was not "honest in fact". Id. at 14.[32]

We do not find that Mountbatten's actions here violated any standards of good faith and fair dealing to which it was subject. We first note that the Pennsylvania intermediate courts[33] are not completely clear about what contracts this duty applies to. AFNY cites to Liazis v. Kosta, Inc., 618 A.2d 450, 454 (Pa. Super. 1992), which held that, "Fundamentally, every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract."[34] Similarly, Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. 1992), stated that the "general duty of good faith and fair dealing" as set forth in the Restatement (Second) of Contracts § 205 had been "adopted in the Commonwealth" in, for example, Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (Pa. Super. 1989).

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[32]AFNY also argues that Mountbatten terminated it without proper thirty day notice, and that this also violated the standard of good faith and fair dealing. Since we have found above that the January 19, 1999 letter and Mountbatten's behavior thereafter was not a violation of the thirty day notice requirement, we will not consider this point in assessing good faith and fair dealing.

[33]AFNY does not cite, nor have we located, a Pennsylvania Supreme Court case on point.

[34]In support of this proposition, Liazis cited Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 148 (Pa. Super. 1985), which itself cited Restatement (Second) of Contracts § 205.

However, the Creeger Brick court noted that, "In this Commonwealth the duty of good faith has been recognized in limited situations." Creeger Brick, 560 A.2d at 153. The Creeger Brick opinion went on to state that such a duty had been accepted in franchiser/franchisee contracts[35] and contracts between insurer and insured but had not been accepted n debtor/creditor contracts, see Creeger Brick, 560 A.2d at 154. Recently, our Court of Appeals has noted the limited nature of the duty of good faith in Pennsylvania, see Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995).[36]

It is therefore unclear whether the Pennsylvania Supreme Court[37] would apply a standard of good faith and fair dealing to the agency contract between Mountbatten and AFNY. We need not resolve this, however, because we find that

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[35]This was the "most notabl[e]" use of the doctrine, Creeger Brick, 560 A.2d at 153.

[36]Duquesne Light Co. noted that the duty is applied under the U.C.C. to interpret the parties' justifiable expectations under the contract, but is not used to enforce an "independent duty divorced from the specific clauses of the contract." Duquesne Light Co., 66 F.3d at 617. "In the absence of a dispute about the parties' reasonable expectations under a particular term of the contract, an independent duty of good faith has ben recognized [only] in limited situations." Id. at 618 (citing Creeger Brick, 560 A.2d at 153). We note that the actions about which AFNY complains do not appear to be tied to the interpretation of any of the contract provisions, and an agency contract of the sort at issue here is not among the specific contracts described in Creeger Brick as subject to the duty of good faith.

[37] See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 486 (3d Cir. 1997) (noting that federal courts must apply state law as we predict the state supreme court would).

Mountbatten's behavior does not in any event violate such a standard.[38] First of all, AFNY's complaints about the timing of the termination notice can't violate the duty of good faith since the Agreement specifically contemplated either party's right to terminate the Agreement for convenience, see Mountbatten Agreement ¶ 13. Given this contractual provision, it is simply irrelevant that a month before the termination notice Mountbatten had "encouraged" AFNY with respect to the business relationship, or that AFNY did not receive any warning that the termination notice was imminent. Similarly, it is not a violation of any duty of good faith that Mountbatten continued to accept business AFNY submitted up to and including the date of the letter of termination, since this action was certainly not outside the relationship the Agreement contemplated.[39] Cf., e.g., Amoco Oil Co. v. Burns, 437 A.2d 381, 384 (Pa. 1981) (holding that a good

[38]As a basic proposition, "[t]he duty of 'good faith' has been defined as 'honesty in fact in the conduct or transaction concerned.'" Somers, 613 A.2d at 1213 (quoting 13 Pa. Cons. Stat. Ann. § 1201), and violations of the duty may include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Id.

[39]We should note that we find AFNY's claim on this to be somewhat puzzling. AFNY appears to argue that it was a violation of the duty of good faith for Mountbatten to accept AFNY's business on and before January 19, 1999 and also that it was a breach of the Agreement to decline new bids submitted after January 19, 1999. To accept these propositions as simultaneously true would be to put Mountbatten between a "good faith" rock and a "contractual breach" hard place. As discussed in the text, of course, we find that neither of these actions lead to Mountbatten's liability.

faith duty did not apply to the termination of a gasoline station franchising contract where the franchiser had reserved the right to terminate without cause).

Similarly, AFNY's claims regarding the list of AFNY's producers do not raise a question of good faith that prevents summary judgment on the breach of contract claim. AFNY argues that after Mountbatten got the list of producers, Mountbatten contacted some of those producers, and also that some of these producers submitted "change of broker" letters to Mountbatten, see Ex. G, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J.[40] Even on the inference that these events are connected, they cannot go to show a breach of the duty of bad faith with respect to the Agreement because they are too far removed from the contract itself. The Mountbatten Agreement, as discussed above, was very limited in the powers it granted AFNY, and it does not discuss in any way the relationship between AFNY and its clients or the relationship between Mountbatten and AFNY's clients. The Agreement is not exclusive in any dimension: it does not limit the number or type of agents, producers, or brokers with whom Mountbatten can transact business, nor does it limit the number of surety companies or producers with whom AFNY can transact. Even assuming that what Mountbatten did with the list of

[40]Although AFNY does not use this evidence explicity in its argument about good faith, according to AFNY's exhibits, Mountbatten contacted at least one producer to ask about "bond status" and "if his agents were treating him ok", Ex. J., Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., Fax from Nationwide Administrative Services, Inc.

producers was in some sense wrongful, this does not necessarily make out a violation of the amorphous duty of good faith that is implicit in the Agreement, particularly given the limited nature of this arm's-length contract.[41]

We thus conclude that Mountbatten did not materially breach the Agreement prior to AFNY's withholding of the net premiums owed to Mountbatten.

c. Mountbatten's Alleged Waiver of the Payment Provision

AFNY argues that, while ¶ 5 of the Agreement requires AFNY to pay the net premiums to Mountbatten within thirty days of Mountbatten's invoice, Mountbatten, in fact, acquiesced to a course of performance under the contract in which AFNY made payment within sixty to ninety days. Therefore, avers AFNY, Mountbatten cannot demand compliance with ¶ 5.

Waiver by acceptance of a course of performance is provided for in comment (g) to Restatement (Second) of Contracts § 202, which states that "[w]here it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party."[42] Even under this standard,

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[41]This is not to say that there is necessarily no remedy for these alleged acts; AFNY's counterclaims of, inter alia, misrepresentation and misappropriation of trade secrets are based in part on the conduct complained of here with respect to AFNY's customer list.

[42]It is unclear if Pennsylvania courts have adopted (continued...)

however, we cannot find any issues of material fact to preclude summary judgment on the breach of contract.

AFNY's argument appears to be based on the theory that since it was "wrongfully terminated" on January 19, 1999, AFNY need not make any payments of net premiums to Mountbatten that came due after January 19, 1999. An examination of the invoices for the bonds in question, see Ex. D, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J., shows that the invoice dates range from October 12, 1998 to January 14, 1999. Using the "ninety day delay" course of performance, AFNY alleges that none of these were actually due on January 19, 1999 and therefore AFNY is freed from its obligation to pay these net premiums over to Mountbatten.

We find that this argument has no merit. This suit was filed on May 26, 1999, at which time even the latest of the invoices at issue, dated January 14, 1999, had gone unpaid for at least one hundred-fifty days. AFNY offers no evidence to suggest that the waiver of the thirty day requirement in ¶ 5 of the Agreement had gone this far. Moreover, Mountbatten is not suing

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[42](...continued)
comment (g) to § 204. AFNY directs us to Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 n.6 (Pa. 1978), in which the Pennsylvania Supreme Court endorsed the draft comment only insofar as it meant "a course of performance is always relevant in interpreting a writing." Id. AFNY also cites to Agathos v. Starlite Motel, 977 F.2d 1500, 1509 (3d Cir. 1992) (citing Restatement (Second) of Contracts § 204 cmt. g), but as that case was explicitly decided under "general principles of contract law" rather than under Pennsylvania law, it does not provide guidance to us here.

on a theory that the payments were not made in a timely fashion, but rather on the theory that the payments were not and have not been made at all. Even if the course of performance accepted by Mountbatten allowed AFNY to pay invoices within ninety (or more) days, there is no suggestion that Mountbatten accepted a course of performance wherein AFNY simply failed to pay at all. To the extent that the claim that Mountbatten has waived its ability to require payment of the outstanding premiums is dependent upon a finding that the contract was wrongfully terminated on January 19, 1999, we have found above that there was no such wrongful termination.[43] We consequently reject AFNY's claim that waiver bars a finding of summary judgment on the breach of contract claim.[44]

There being no dispute that AFNY has in fact retained premiums from Mountbatten, and as we have found above that AFNY's various claims of justification are not legally meritorious, we will grant summary judgment to Mountbatten on Count I of its Complaint.[45]

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[43]This is not to say, though, that a wrongful termination by Mountbatten, had it transpired, would necessarily have been a legal justification for AFNY to withhold payments on already-issued invoices.

[44]AFNY may be correct that there exist issues of material fact as to whether there was an implied waiver of the thirty day payment requirement, but as our discussion in the text shows, we find that the entire issue of a waiver of the time of payment is inapplicable to the situation here, where AFNY simply did not make the payments at all.

[45]As Exhibit D to its motion for summary judgment,
(continued...)

2. Conversion

Mountbatten next moves for summary judgment on its claim of conversion against AFNY (Count II).

> Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification. Conversion can result only from an act intended to affect chattel. Specific intent is not required, however, but rather an intent to exercise dominion or control over the goods which is in fact inconsistent with the plaintiff's rights establishes the tort. Money may be the subject of conversion.

Shonberger v. Oswell, 530 A.2d 112, 114 (Pa. Super. 1987)(citations omitted).

Here, Mountbatten argues that there is no dispute that AFNY has retained certain net premium payments owed it, and that AFNY never had an actual property right either in the bonds issued or in the premiums that were paid through it. Thus AFNY has converted those sums to its own use. In response, AFNY argues that it cannot be liable for conversion on these facts as a matter of law, because an action for conversion does not lie

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[45](...continued)
Mountbatten has provided us with a collection of invoices reflecting premiums due Mountbatten that AFNY has not paid. Mountbatten avers that these invoices were produced by AFNY during discovery and admittedly constituted those premiums due and owing. Mountbatten states that this exhibit contains twenty-three invoices reflecting $131,863.80 in premiums. An examination of Exhibit D, however, reveals that it in fact contains only twenty-two invoices reflecting $129,887.50 in premiums owed. We will consequently enter judgment for Mountbatten in the sum of $129,887.50.

where the rights to the property in question are defined by an enforceable contract.

As noted above, action for conversion in Pennsylvania may be brought for conversion of money, see Shonberger, 530 A.2d at 114, and Pennsylvania courts have also allowed an action of conversion to lie in factual situations somewhat analogous to this case. For instance, in Shonberger, the court found that conversion could lie where the defendant held plaintiff's goods on consignment and then failed to pay over the proceeds of the sales, see Shonberger, 530 A.2d at 114-15. Furthermore, the Pennsylvania Supreme Court has held that conversion may lie where the defendant was an insurance broker who failed to pay premiums over to the insurer, see Pearl Assur. Co. v. National Ins. Agency, Inc., 30 A.2d 333, 337-38 (Pa. 1943). On the other hand, a number of courts have held that under Pennsylvania law a plaintiff may not sue in tort for damages arising from a breach of a contract, see, e.g., People's Mortgage Co. v. Federal Nat'l Mortgage Ass'n, 856 F. Supp. 910, 929 (E.D. Pa. 1994) (canvassing cases).

Upon consideration of the cases discussed above and the facts before us, we find that no action for conversion lies here. We have found above that an action for breach of contract may be maintained here, and that such a theory allows recovery on the undisputed facts. The Shonberger and Pearl Assurance cases, while allowing for a conversion action in similar situations, do not contemplate a concurrent action for breach of contract to

recover the same loss. As outlined in People's Mortgage, Pennsylvania courts bar actions in conversion arising from breach of contract, partly in order to avoid blurring the line between tort and contract actions, see People's Mortgage, 856 F. Supp. at 929. Here, AFNY clearly incurs liability on a breach of contract theory, and the conversion claim is based on the same facts, with Mountbatten seeking under conversion the same payments that it seeks under breach of contract. We therefore find that the action for conversion cannot be allowed as a matter of law.[46] We will therefore grant judgment to AFNY on Count II of the Complaint.

3. Prejudgment Interest

[46]We recognize that this is a close case, particularly with reference to the Shonberger precedent. People's Mortgage notes that Shonberger is the "one opinion" of the Superior Court that allowed conversion to go forward in a breach of contract situation, and distinguished it from the other cases where conversion claims were barred in breach of contract circumstances partly on the basis that Shonberger involved a consignment arrangement, see People's Mortgage, 856 F. Supp. at 929 n.10. This distinction was important because in a consignment arrangement, the consignee -- the defendant in Shonberger -- has no property right in the consigned merchandise and consequently none in the payments made to it for such merchandise. Consequently, such a situation is much more amenable than other contractual arrangements to an analysis under the tort of conversion, where the defendant is essentially wrongfully holding another's property. Likewise, in this case, AFNY had no property interest in the bonds that were issued, and consequently no interest in the net premiums paid through it. Notwithstanding this similarity, and, as noted in the text, partly because the contract/tort concerns were not discussed or reflected in Shonberger, we have adhered to the distinction made in Pennsylvania courts between contract and tort.

In its motion for summary judgment, Mountbatten argues that it deserves an award of prejudgment interest at the market rate compounded from the date the payments were originally due. In its response, AFNY does not explicitly challenge this claim.

We consider this case under diversity jurisdiction, and consequently the question of the appropriateness of prejudgment interest is governed by Pennsylvania law, see W.A. Wright, Inc. v. KDI Sylvan Pools, Inc., 746 F.2d 215, 219 (3d Cir. 1984). "For over a century it has been the law of this Commonwealth that the right to interest upon money owing upon contract is a legal right. That right to interest begins at the time payment is withheld after it has been the duty of the debtor to make such payment." Spang & Co. v. USX Corp., 599 A.2d 978, 984 (Pa. Super. 1991) (quoting Fernandez v. Levin, 548 A.2d 1191, 1193 (Pa. 1988)) (citations omitted).[47] Such interest is calculated as simple interest and is levied at the statutory rate, which is six percent, see 41 Pa. Cons. Stat. Ann. § 202, Spang & Co., 599 A.2d at 984.

On the other hand, Pennsylvania courts have adopted a flexible approach with respect to the imposition of prejudgment interest, involving the examination of the particulars of each case, see Peterson v. Crown Fin. Corp., 661 F.2d 287, 295-96 (3d Cir. 1981). Peterson held that while normal breach of contract

[47]The justification for such interest is that the defendant has denied to plaintiff the use of the amount owed, see Sprang & Co., 599 A.2d at 984 (citing Frank B. Bozzo, Inc. v. Electric Weld Divison, 498 A.2d 895, 898 (Pa. Super. 1985).

circumstances would call for prejudgment interest at the statutory rate, a claim that sounded in restitution -- an equitable concern -- could call for a higher rate, see Peterson, 661 F.2d at 295.[48] However, "in Peterson, the court determined that a situation where money was extracted and unjustly withheld was not analogous to a case where a promise to pay money or render a service had been breached." Daset Mining Corp. v. Industrial Fuels Corp., 473 A.2d 584, 596 (Pa. Super. 1984). Thus, in deciding whether a higher than statutory rate and compounding are appropriate, we must first ask whether the damages in the form of net premiums that AFNY withheld are in the nature of a breached promise to pay money or instead in the nature of restitution to Mountbatten, cf. Carroll v. City of Philadelphia, 735 A.2d 141, 146 n.5 (Pa. Cmwlth. 1999) (citing Peterson and declining to apply a higher rate of interest because the claim did not sound in restitution and the case was not an action in equity).

Upon consideration of this standard and the facts before us, in our discretion we find that it is appropriate to order simple prejudgment interest at the statutory rate. Fundamentally, the premiums AFNY owed to Mountbatten were contractual in nature, as it was the contract that permitted AFNY to solicit bonds and to receive and forward the premiums. While

[48]Despite that AFNY has not raised any opposition to Mountbatten's interest claim, since the award of such higher interest is committed to our discretion, a full analysis is warranted.

there are indeed some elements of a restitution claim in Mountbatten's action, these are not sufficient to take this case out of the standard rubric of interest calculation for breach of contract cases. In sum, we find that the needs of justice would not be served by ordering higher than statutory interest.[49]

4. Attorney's Fees

Mountbatten also argues that it is entitled to attorney's fees incurred in bringing the action to enforce its rights under the Mountbatten Agreement. AFNY does not raise any explicit response to this argument.

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[49] To convince us that a higher rate of interest is indeed appropriate here, Mountbatten cites Lexington Ins. Co. v. Abington Co., 621 F. Supp. 18 (E.D. Pa. 1985), in which the defendant, an insurance broker, failed to remit to the plaintiff insurance company certain premiums, in breach of a contractual commitment to do so. The defendants in that case defaulted, and the court found that the plaintiff's damages sounded in restitution since the funds were "improperly and intentionally" withheld by the defendants. Lexington Ins. Co., 621 F. Supp. at 20-21. The court ultimately held that in the circumstances of the case, it was appropriate to order prejudgment interest at the market rate, compounded, see id. at 21.

While Mountbatten evidently believes that this precedent settles the instant case, there are a number of important distinctions between our case and Lexington Ins. Co. For one thing, the defendants in Lexington Ins. Co. defaulted, and the district court found that vacating default was inappropriate because that they had no meritorious defense, see id. at 20. Here, AFNY has forwarded and aggressively argued a number of defenses, and this goes to the question of the impropriety of the retention of the funds. Further, in Lexington Ins. Co. the prevailing market interest rates over the period at issue (1977-1985) were in some cases double and triple the statutory rate, which would go to the inequity to the plaintiff of ordering the statutory rates, see Lexington Ins. Co., 621 F. Supp. at 21 n.5. Thus, upon consideration of these distinctions, and keeping in mind Peterson's mandate to consider each case individually, we find that Lexington Ins. Co. does not compel us to order a market interest rate here.

The Mountbatten Agreement contains an indemnification provision stating that:

> The Agent [AFNY] agrees to and does hereby indemnify, defend and hold harmless the Company [Mountbatten] . . . from and against any and all claims, demands, losses, liabilities, suits, causes of actions, judgments, costs and expenses, including attorneys' fees, and any other damages whatsoever, that the Company may sustain or incur relating to Agent's performance or non-performance under this Agreement by reason of and including but not limited to (1) Agent having executed or procured the, [sic] execution of any bond or bonds, (2) Agent failing to perform or comply with any of the covenants or conditions of this Agreement, (3) any payment, compromise, judgment, fine, penalty, or similar charge paid by the company, or (4) the Company enforcing any of the covenants and conditions of this Agreement.

Mountbatten Agreement ¶ 17.

Here, Mountbatten has brought this action to recover net premiums payable under the contract, and consequently this case would appear clearly to fall under condition number (4) of the indemnification provision. Thus, we find that an award of attorney's fees and costs to Mountbatten is appropriate. However, and importantly, AFNY is by no means liable for all of the attorney's fees Mountbatten incurred in this case, which involves not only these claims by Mountbatten, but also the AFNY counterclaims. It would appear to us from the parties' pleadings, in particular the discovery motion practice, that perhaps the greater part of counsels' time and effort in this case has been spent on the issues raised by the counterclaims

rather than by Mountbatten's claims. Therefore, we will predicate the actual award of attorney's fees on Mountbatten's submission of an affidavit documenting the fees accrued in prosecuting the claims for recovery of the net premiums as distinguished from those incurred in defending the counterclaims.

B. AFNY's Counterclaims Against Mountbatten

AFNY's third amended counterclaims against Mountbatten allege breach of contract (Count I), misrepresentation (Count II), misappropriation of trade secrets (Count III), tortious interference with contractual relations (Count IV), and tortious interference with prospective contractual relations (Count V). It is useful at the outset to review the factual allegations that support these claims.

AFNY alleges that Mountbatten breached their contract through improper notice of termination and violation of the implied covenant of good faith and fair dealing. The claim of misrepresentation is based upon the allegation that Mountbatten falsely represented, when requesting AFNY's list of producers, that it would protect the information on the list and that it sought the list in order to protect AFNY. In fact, AFNY claims, these statements were false and were made to induce AFNY’s reliance. Mountbatten then allegedly used the disclosed list of producers -- a putative trade secret -- to solicit AFNY's producers, and this forms the grounds for the claim of misappropriation of trade secrets.

AFNY also alleges that Mountbatten's solicitation of AFNY's producers constitutes interference with existing and prospective contractual relations, and that similarly Mountbatten acted to harm the existing and prospective relations between AFNY and F&D by encouraging F&D to sever its relationship with AFNY.

1. AFNY's Damages

Mountbatten's first argument in seeking summary judgment on AFNY's counterclaims is simply that discovery has produced no evidence of damages, and consequently that the counterclaims must fail, since damages are an element of each of the counterclaims. As this is a blanket argument that involves each of the counterclaims, it is appropriate to discuss it first, prior to an examination of each of the individual counterclaims.

We first note that while we follow the standards for summary judgment provided in the Federal Rules of Civil Procedure and federal case law, the standards for the required showing of damages must come from Pennsylvania law.[50] Consequently, in considering Mountbatten's claim that there is insufficient evidence here to allow AFNY's counterclaims to go forward as a matter of law, we must consider, taking inferences in AFNY's favor, whether there exist genuine issues of material fact with respect to whether the Pennsylvania damage standards are met.

[50]Thus, to the extent that the parties have referred us to opinions which consider damages issues under, for example, federal antitrust law, these precedents cannot directly guide us here.

Before outlining those standards, we review the evidence regarding damages that AFNY proffers in response to Mountbatten's claims. AFNY avers that it lost thirteen active accounts[51] when Mountbatten solicited Andrew & Arthur,[52] one of AFNY's producers. In support, AFNY refers to the affidavit of Wayne Price, one of AFNY's principals who avers that the accounts were lost, see Aff. of Wayne Price ¶ 19, as well as to a letter from Mountbatten to AFNY dated January 11, 1999 in which Mountbatten informs AFNY that the thirteen accounts had transmitted "change of broker" letters[53] to Mountbatten and that AFNY had five business days in which to obtain a countermanding letter or else lose the account, see Ex. G, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J.

Similarly, AFNY avers that lost its "large Texas account, SAJO as a result of [Mountbatten's] improper solicitations." Mem. of Law in Opp'n to Mountbatten's Mot. for

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[51]"Accounts" would appear to refer to individual construction firms.

[52]Price testified that AFNY had an oral agreement with Andrew & Arthur whereby Arthur & Andrew would write Mountbatten business through AFNY in exchange for one-half of the commission. Price also stated that it was Mountbatten who put AFNY in touch with Andrew & Arthur. See Dep. of Wayne Price at 120-21. Price went on to state that "I got a change of broker that Mountbatten was dealing direct with them through Don Jacobs," which was why the relationship between AFNY and Andrew & Arthur ended. Dep. of Wayne Price at 121. As noted in the text, the "change of broker" letter supplied to the court did not state to which broker the accounts were shifting.

[53]It appears that the effect of the "change of broker" letters was to remove AFNY from the servicing of, and hence the receipt of commissions from, these accounts.

Summ. J. at 23. In support, AFNY offers the deposition testimony of Wayne Price, who states that AFNY "lost Sajo", Dep. of Wayne Price at 119, and also a communication between Tom Kay of Mountbatten and a "Jim Albright" dated March 31, 1999 discussing a submission from "Sajo Construction." Ex. 5, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at Ex. 22.[54] AFNY further argues that the loss of SAJO involved the loss of bonds in negotiation at the time of termination and also bonds in the future, and supports this claim by reference to Wayne Price's affidavit and deposition testimony, see Aff. of Wayne Price ¶ 26 ("AFNY has lost potential opportunities to provide bonds for clients, including several bonds for SAJO."), Dep. of Wayne Price at 118 ("We lost four or five, six or seven from Sajo and many other accounts from Elsey[55].").

AFNY also avers that it lost accounts following its termination because "it did not have a sufficient amount of time to place its clients with new surety companies," see Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 23, and supports this with reference to Wayne Price's affidavit and deposition testimony, see Aff. of Wayne Price ¶ 25 ("Because of the strength of its relationship with [Mountbatten] and the immediacy of the

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[54]This communication states "Since the previous agent [evidently AFNY] has been terminated I don't see that a BOR [possibly "broker of record"] is required. I have requested our database be changed to reflect you as the gateway (previous AFNY account)." Ex. 5, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at Ex. 22.

[55]One of AFNY's producers.

termination, AFNY had difficulty replacing all of its business. AFNY has also had difficulty replacing its business because the market for non-standard business is quite small."), Dep. of Wayne Price at 119 ("When we couldn't write through Mountbatten for a two or three month period we lost client accounts that client [sic] knew we couldn't write with Mountbatten and therefore placed them elsewhere."). AFNY argues that it has produced evidence of the total premiums it generated from AFNY and F&D and so the amount of premiums that would have been generated in the future can reasonably be estimated, see Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ J. at 17 (citing AFNY's response to Mountbatten's Interrogatory number 12).

Lastly, AFNY argues that it has suffered damages in its operations, as it has had to lay off both a bookkeeper with eight years tenure and also an assistant underwriter, and that it has been forced to leave its office space and relocate to Wayne Price's home. In support, AFNY cites to Wayne Price's deposition and affidavit testimony, see Aff. of Wayne Price at ¶ 27 ("Since [Mountbatten] terminated AFNY, AFNY has been forced to significantly downsize its business. AFNY laid-off its bookkeeper . . . its assistant underwriter . . . and cut its part-time employees [sic] hours from three days a week to one day a week. Finally, AFNY is in the process of moving out of its current office space . . . [and] plans to move its offices to my home."), Dep. of Wayne Price at 86 (Q: Can you tell me the reason why you let [the bookkeeper] go? A: I was paying her $35,000 a

year and I wanted to save the money."). This is also supported by the testimony of Eleanor Brassill[56], see Ex. 3, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 8.

It appears that AFNY has provided[57] at least four documents detailing financial information related to damages: (1) a document listing bonds and premiums from June 1998 to December 1998 on Andrew & Arthur accounts, (2) a document listing monthly premium volume for "Mountbatten Bonding" from May 1997 to February 1999,[58] (3) AFNY's Statement of Income and Retained Earnings for 1998, (4) AFNY's Statement of Income and Retained Earnings for 1999.[59] AFNY appears to have used the information reflected in these documents in calculating damages, as evidenced by their responses to Mountbatten's interrogatories. In responding to Interrogatory number 12 of Mountbatten's second set of interrogatories, AFNY used its average premium volume from

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[56]The bookkeeper in question.

[57]AFNY does not advance these documents as proof of damages; rather, they are exhibits to Mountbatten's pleadings.

[58]These first two documents are Ex. 2, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J.

[59]These last two documents are Ex. 5, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. Relying on these documents, Mountbatten notes that AFNY's total commission income in 1999 was in fact higher than it was in 1998, and that consequently these can't be evidence of any loss of profits, see Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. at 31. We cannot reach the same conclusion: simply because the results for 1999 were better than those for 1998, there is nothing logically to say that they might not have been better still but for Mountbatten's alleged actions. The improvement between the years, without more, does not foreclose a showing of damages.

September to December 1998[60] to estimate the lost income caused by Mountbatten's alleged interference with the relationship between AFNY and F&D, see Ex. H, Supplemental Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. at 9.[61]

Having thus canvassed the evidence of damages before us, we can move to consider the legal standards that AFNY must meet.

In Pennsylvania, damages are to be found by the finder of fact, and the burden of proving damages rests with the plaintiff, see Miller Oral Surgery, Inc. v. Dinello, 611 A.2d 232, 236 (Pa. Super. 1992). The plaintiff is required to furnish "only a reasonable quantity of information from which the fact-finder may fairly estimate the amount of damages." Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1257 (Pa. Super. 1983). Though the fact-finder may not award damages on the basis of "speculation or guesswork", the fact-finder still "may make a just and reasonable estimate of the damage based on relevant data, and in such circumstances may act on probable and inferential, as well as upon direct and positive proof." Id. "Thus the law does not demand that the estimation of damages be completely free of all elements of speculation." Id. While

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[60]At which time, AFNY avers, it was writing for F&D through Mountbatten.

[61]We note with some concern that Wayne Price of AFNY referred to this response as "a rough guesstimate". Ex. B, Supplemental Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J., Dep. of Wayne Price at 227.

purely speculative or remote damages are improper, "damages are considered remote or speculative only if there is uncertainly regarding the existence of the damages, not if there is uncertainty concerning the precise calculation of the damages." Birth Ctr. v. St. Paul Cos., 727 A.2d 1144, 1161 (Pa. Super. 1999). "So then, mere uncertainty as to the amount of damages will not bar recovery where it is clear that the damages were the certain result of the defendant's conduct." Delahanty, 464 A.2d at 1257 (citing Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)). Also, with respect to lost profits, while there may be difficulties inherent in finding these sorts of damages, "evidence of past profits in an established business can be a valid and reliable basis for estimating future profits." Birth Ctr., 727 A.2d at 1162.

Mountbatten's theory of damages here is essentially that Mountbatten's wrongful actions denied AFNY various business opportunities. Specifically, Mountbatten interfered with the contractual relations between AFNY and F&D, denying AFNY profits from writing future business with F&D, and Mountbatten also, through misrepresentation and theft of trade secrets, interfered with AFNY's relations with various of its producers and accounts, denying AFNY the profits from future business with these entities.

Upon review of the evidence before us, we cannot find that AFNY has made so insufficient a showing of damages as to warrant a judgment for Mountbatten on the counterclaims. At the

very least there is evidence, through the testimony of AFNY's principals, that AFNY lost business, both in the sense of not being able to transact with F&D and in the sense of losing the business of various producers. As noted above, the calculation of damages from lost profits is not a certain proposition, and to survive judgment as a matter of law it need not be precise. Also, we have before us at least some records of AFNY's profits prior to the alleged bad acts, and this would serve as a basis for a jury's calculations; the jury will also be able to consider the testimony of AFNY's principals as to the loss of various parts of their business. We therefore conclude that judgment as a matter of law on the issue of the existence of damages is not now warranted.[62]

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[62]On the other hand, the damage evidence is not without its problems. As Mountbatten points out, the evidence offered by AFNY speaks largely of commissions, which would appear to amount to gross revenue, rather than of profits, which are the logical measure of AFNY's damages. Since the 1998 and 1999 financial statements contain information on gross commissions and net profits, though, a jury could extrapolate from that information and come to a conclusion on net profit loss based on gross commission loss, and so this is not fatal to AFNY. Also, AFNY appears not to keep records that detail their profits specific to each producer with whom it works, so the losses that are attributable to each "lost" producer would be difficult to calculate. Further, because some factors that determine AFNY's commission on any particular bond -- for example the commission that AFNY pays the producer -- are determined on a case-by-case basis, generalization of losses may not be possible. As the record now stands, we do not believe that these concerns would prevent a jury from reasonably finding damages, however. Of course, our rejection of this argument here does not foreclose a similar argument under Rule 50 should this case ever reach trial.

This is also an appropriate time to address Mountbatten's request for additional discovery. Mountbatten avers that to the extent that Wayne Price has offered testimony

(continued...)

2. Breach of Contract

Mountbatten seeks summary judgment on AFNY's claim that Mountbatten breached the Agreement on the basis that the mode of termination was not a breach of the contract and that Mountbatten did not otherwise breach any implied covenant of good faith and fair dealing. AFNY's response involves arguments similar to those it made in response to Mountbatten's motion for summary judgment on its claim that AFNY breached the contract. These arguments are discussed at length above, where we concluded that on the undisputed facts, and as a matter of law, Mountbatten had not breached the Agreement. We will therefore grant

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[62](...continued)
about AFNY's losses, he identified a number of documents upon which he would rely for these figures. Mountbatten avers that Price stated he would rely upon, inter alia, AFNY's ledger book, AFNY's tax returns for 1998 and 1999, and Agency Statements of Account for each of the various sureties and wholesalers AFNY dealt with. Mountbatten argues that AFNY failed to disclose such documents during discovery and that AFNY should be required now to disclose these documents. In response, AFNY essentially argues that Mountbatten had not previously requested these documents in discovery and should not be able to obtain them now. AFNY also advances various objections to disclosure of these documents, including that they are cumulative in light of the financial statements already disclosed, that locating some of the requested information would be burdensome in that it would involve a search of each of AFNY's 850 individual files, each of which is 250 pages thick, and that disclosure of the Agency Statements of Account would involve disclosing not only AFNY's confidential customer list, but also revealing other sureties' pricing structures, an eventuality which would result in AFNY's being "blackballed".

In the first instance, Mountbatten's failure to provide page references to particular points of the deposition make it difficult to assess the degree to which Price did in fact rely on these documents. In any event, there can be no dispute here that discovery is closed, and we shall not order the disclosure of additional documents.

Mountbatten's motion for summary judgment on Count I of AFNY's Third Amended Counterclaims.

3. Misrepresentation

Mountbatten seeks summary judgment on AFNY's claim of misrepresentation, arguing that there is no proof of false statements Mountbatten made, and that there is in any event no link between this alleged statement and the alleged harm -- in particular, that there is no evidence that Mountbatten solicited any of AFNY's producers. In response, AFNY argues that there exist factual disputes regarding the solicitations and consequently regarding the truth of the statements made.

In the Third Amended Counterclaim, AFNY states that Mountbatten acted "negligently, carelessly, or recklessly with respect to the truth of the representations made" about the reasons for which Mountbatten wanted to know the identity of AFNY's producers. Third Amended Counterclaim ¶ 90. AFNY thus appears to be alleging both (or either) intentional misrepresentation and negligent misrepresentation. The elements of intentional misrepresentation are:

> (1) A representation;
> (2) which is material to the transaction at hand;
> (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
> (4) with the intent of misleading another into relying on it;
> (5) justifiable reliance on the misrepresentation; and,
> (6) the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999). The elements of negligent misrepresentation are:

> (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.

Id. at 561.

Mountbatten first argues that there was no misrepresentation by noting Wayne Price's deposition testimony that his understanding from Mountbatten was that Mountbatten was interested in the identities of AFNY's producers as well as the ultimate clients because Mountbatten wanted to ensure that AFNY was staying in touch with the ultimate clients, not just an intermediary, see Mem. of Law. in Supp. of Mountbatten's Mot. for Summ. J. at 49, Dep. of Wayne Price at 57-58. We note that Price further testified that he thought that the request was for the purpose of preventing Mountbatten from unintentionally competing with AFNY by soliciting the same producers, see Dep. of Wayne Price at 60-61.[63] While this testimony may be true as far as it goes -- that is, that these were Price's contemporaneous understandings -- it hardly goes to show that there was no

[63]Mountbatten does not dispute that the request for this information was made at a meeting in October, 1998.

misrepresentation to the extent that Mountbatten's actual purpose in seeking the information was different.[64]

Thus we move along to Mountbatten's second argument, that there is no evidence on the record to show that Mountbatten had in fact solicited AFNY's producers, and that consequently even to the extent that AFNY lost business, this damage cannot be connected to the alleged misrepresentation. AFNY advances several items of evidence to show that such solicitation occurred. First, it provides a letter from Mountbatten dated January 11, 1999 -- after AFNY had provided its producer information -- in which Mountbatten reported to AFNY that thirteen accounts had sent "change of broker" letters to Mountbatten, see Ex. G, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. Also, on February 17, 1999, AFNY received a letter[65] from Nationwide Administrative Services of Holiday, Florida[66] which was marked "Re: Navarro" and which reported that, "Louis advised a Tom Jennines [sic] called him and wanted to know if his agents were treating him ok, bond status, etc.. WHO is

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[64]Mountbatten principals have also testified that the purpose in seeking the producer information was benign, see Dep. of Tom Kay at 106.

[65]The exact mode of transmission is not clear. The letter is in the form of a memo, and the "To" address reads "Terry Smith AIA via fax." "AIA", from documents elsewhere in the record, would appear to be the Associated Insurance Agency of Boston, Massachusetts. Since the salutation is "Dear Terry", it seems that AFNY received this at least second-hand.

[66]The letter does not disclose the identity of its author.

TOM JENNINES. he told Louis he is from the bond company and his phone number is 610-664-8800? What the hell is going on??? CALL ME", Ex. J, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. From documents elsewhere in the record, we find that a Tom Jennings is an employee of HMS Dreadnaught, Inc., an entity related to Mountbatten, and we also observe from the record that "Navarro" is a "direct client" for surety bonds with whom AFNY had done business, see Dep. of Wayne Price at 80. Mary Price of AFNY also received a phone call from Mr. Navarro asking why Tom Jennings was calling him, and informing her that during the Navarro/Jennings conversation Jennings had asked whether Navarro was happy with his present agent, see Ex. 4, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., Dep. of Mary Price at 63.[67] Finally, AFNY offers a communication dated March 31, 1999 from Tom Kay of Mountbatten to "Jim Albright", who AFNY avers is one of their producers, see Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 31, discussing Albright's submission of material from the account of Sajo Construction, allegedly an account for which AFNY had written business, see Ex. 5, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at Ex. 22.

The question before us is therefore whether this evidence provides a basis by which a reasonable jury could find

[67]By a letter dated February 25, 1999, Mountbatten acknowledged that Jennings had called Navarro, but denied that there had been any questions regarding Navarro's satisfaction with the agent, see Ex. K, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J.

that solicitation did occur. We first observe that nothing AFNY produced is direct evidence of solicitation in that there is no first-hand, admissible testimony or documentary evidence stating that Mountbatten had approached one of the producers or accounts whose identity had been disclosed to Mountbatten by AFNY[68] and had specifically sought business.[69] In the absence of such direct, unambiguous evidence, we are left to ask if the items above would allow a reasonable jury to infer the solicitation.

We next note that much of the evidence discussed above, including Navarro's statements to Mary Price and the communication documented in the letter from Nationwide Administrative Services,[70] is hearsay. Hearsay statements that are not capable of being admitted at trial cannot be considered

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[68]In this context, we note that since the identity of the ultimate account -- that is, the entity being insured -- must surely be known by the surety company, it is unclear to us how the existence of, for example, Navarro was something that was wheedled out of AFNY by Mountbatten's alleged misrepresentation.

[69]That is, this whole question would not be in issue if AFNY had provided even a single affidavit from a producer or account stating that it had been solicited by Mountbatten.

[70]Mountbatten notes the existence of another hearsay communication regarding Mountbatten's alleged wrongful acts. It is a fax from Frederick J. Smith of the Associated Insurance Agency to Wayne Price dated May 12, 1999, in which Smith reports on the goings-on at the Florida Surety Association. According to Smith, the producers in Florida were "hostile" because Mountbatten, while having used these agents initially, was now soliciting sub-agents and accounts individually, thus bypassing the producers, see Ex. 7, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. Smith goes on to say that such solicitation was done under the "pretense" of inquiring if the accounts or sub-agents were happy with their current agents. Id. Of course, this communication is hearsay, and also fails to report any specific solicitation of AFNY's producers or accounts.

on a motion for summary judgment, see Philbin v. Trans Union Corp., 101 F.3d 957, 961 n.1 (3d Cir. 1996); see also Blackburn v. United Parcel Serv., 179 F.3d 81, 96-103 (3d Cir. 1999) (citing Philbin and evaluating closely evidence presented on a motion for summary judgment and excluding such evidence from consideration on the basis that it was hearsay and did not meet any of the various exceptions for admission).[71] There is no doubt that AFNY, in offering these hearsay statements, seeks to use them to assert the truth of the statements: AFNY wants us to believe, for example, that Mountbatten's representatives contacted Navarro in the manner specified in the hearsay statements. We are unaware of, nor has AFNY brought to our attention, any exceptions that would apply to render this hearsay

[71]We recognize that other panels of our Court of Appeals have made more subtle distinctions with respect to hearsay testimony used at the summary judgment stage. In J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524 (3d Cir. 1990), the court noted that Celotex v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986), held that evidence at the summary judgment stage need not be presented in a form admissible at trial, and consequently concluded that hearsay could be considered at the summary judgment stage "if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that would be admissible at trial." Feeser, 909 F.2d at 1542 (citing Williams v. Borough of West Chester, 891 F.2d 458, 466 n.12 (3d Cir. 1989))(internal quotation marks omitted). We initially note that it is by no means clear that the Feeser and Williams holdings extend to pure, and multiple, hearsay evidence of the sort offered in this case. Also, there is no suggestion in the record here that the plaintiff intends to, or would be able to, offer admissible evidence to support the content of the hearsay evidence that it has provided to us. These facts, in tandem with the more recent opinions of our Court of Appeals discussed in the text, convince us that we should not consider the hearsay evidence offered by AFNY.

admissible. Consequently, we cannot consider it in reaching our conclusions on this motion.

Leaving aside the hearsay statements, we are left, as evidence of Mountbatten's solicitation of AFNY's producers and accounts, with (1) Mountbatten's letter to AFNY reporting the "change of broker" letters, (2) Mountbatten's own acknowledgment that it did indeed communicate with Navarro for benign reasons, and (3) the communication of March 1999 from Mountbatten's Tom Kay to Jim Albright regarding Sajo Construction.[72] We find that no reasonable jury could find upon this evidence that Mountbatten solicited AFNY's producers and agents: there is simply nothing in this evidence that infers that Mountbatten solicited AFNY's clients. At the very best, this amounts to highly circumstantial evidence, and even taking all inferences for AFNY we cannot find that it would be reasonable to deduce from it Mountbatten's alleged solicitation.

In turn, without solicitation, there is nothing to connect Mountbatten's statement to AFNY regarding the producer names[73] to AFNY's loss of business, and consequently there is no cause of action for misrepresentation. We will thus grant summary judgment to Mountbatten on Count II of AFNY's Third Amended Counterclaims.

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[72]Mountbatten also asserts that as a surety it had a right to contact the bonded contractors pursuant to the bond agreement.

[73]Moreover, without solicitation there is nothing to indicate that the statement was false in the first place.

4. Misappropriation of Trade Secrets

Mountbatten seeks summary judgment on the claim of misappropriation of trade secrets on the grounds that AFNY's customer list is not a trade secret[74] and that there is no proof that Mountbatten used the alleged secret in a breach of confidence. AFNY responds that its customer list is indeed a trade secret and that Mountbatten breached AFNY's confidence by soliciting its producers and agents.

To be entitled to relief on a claim of misappropriation of trade secrets, a plaintiff must show that (1) there was a trade secret, (2) it was of value to the owner and important in the conduct of his business, (3) the owner had a right to the use and enjoyment of the secret, and (4) the secret was communicated to another under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself to the prejudice of the owner. See Gruenwald v. Advanced Computer, 730 A.2d 1004, 1012 (Pa. Super. 1999).

Clearly, the first question that we must face is whether the "customer list" that Mountbatten allegedly misappropriated is indeed a trade secret. Whether information is

[74]We must agree with AFNY that there is at least a bit of irony here, since earlier in this litigation Mountbatten objected to AFNY's discovery of the identity of the brokers and wholesalers who do business with Mountbatten on the ground that such information was a trade secret. Of course, having made such an argument earlier hardly estops Mountbatten from raising the arguments it does in this context, much less us in taking our own independent view of this issue.

considered to be a trade secret is a question for the jury, see, e.g., Emtec, Inc. v. Condor Tech. Solutions, Inc., No. Civ. A. 97-6652, 1998 WL 834097 at *9 (E.D. Pa. Nov. 30, 1998). "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and gives him an opportunity to obtain an advantage over competitors who do not know or use it." Christopher M's Hand Poured Fudge, Inc. v. Hennon, 699 A.2d 1272, 1275 (Pa. Super. 1997) (quoting Felmlee v. Lockett, 351 A.2d 273, 277 (Pa. 1976)). In determining whether information qualifies as a trade secret, we may consider a number of factors, including (1) the extent to which the information is known outside the owner's business, (2) the extent to which it is known by employees and others involved in the owner's business, (3) the extent of measures taken to guard the secrecy of the information, (4) the value of the information to the owner and to his competitors, (5) the amount of effort or money expended by the owner in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See Christopher M's, 699 A.2d at 1275 (quoting Tyson Metal Prods., Inc. v. McCann, 546 A.2d 119, 121 (Pa. Super. 1988)).

Customer information may be subject to trade secret protection, depending upon the circumstances surrounding the creation of the list, see A.M. Skier Agency, Inc. v. Gold, No. 1341 MDA 1999, 2000 WL 222023, at *4 (Pa. Super. Feb. 28, 2000). Where a business has permanent and exclusive relationships

between customers and salespersons, and the customer lists compiled by the firm represents a material investment of the firm's time and money, a customer list is in the nature of a trade secret, see A.M. Skier, 2000 WL 222023 at *4 (citing Robinson Elec. Supervisory Co. v. Johnson, 154 A.2d 494, 496 (Pa. 1959)). On the other hand, customer lists are "at the very periphery of the law of unfair competition." Renee Beauty Salons, Inc. v. Blose-Venable, 652 A.2d 1345, 1347 (Pa. Super. 1995); see also Fidelity Fund, Inc. v. DiSanto, 500 A.2d 431, 436 (Pa. Super. 1985).

We first observe that AFNY does not appear to have turned over to Mountbatten a "customer list" as such. Instead, on Mountbatten's request during a face-to-face meeting in October, 1998, Wayne Price revealed to a Mountbatten representative the identity of his "majority producers" and thereafter provided the identity of the producers with each bond submission,[75] see Dep. of Wayne Price at 61. Though Mountbatten appears to argue otherwise, we do not think that this manner of disclosure prevents the information from being a trade secret if it otherwise qualifies. Simply because AFNY disclosed its information piecemeal, or because not all of AFNY's customers were revealed to Mountbatten, the customer list's potential classification as a trade secret is not precluded.

[75]This was not information that AFNY had provided as a matter of course previously.

Mountbatten also argues that the customer list can't be a trade secret because the information is in the public domain. Citing Wayne Price's testimony that in seeking customers AFNY consults and employs, inter alia, trade journals and trade directories, see Dep. of Wayne Price at 15-16, Mountbatten concludes that "anyone could take a look at the [trade directory] and identify a producer in a particular location." Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. at 44. We cannot agree that this argument disposes of the claim that the customer list is a trade secret. Wayne Price's testimony that trade journals and trade directories find use in AFNY's marketing only means that these are avenues to start contacts, not that any producer that one happened to telephone would be able to provide the sort of business that AFNY would typically do. Moreover, the record before us shows that Mountbatten and AFNY are engaged in a sub-market of the general surety bond market, namely that for higher-than-normal risk, and consequently the bare argument that the use of these public references eliminates any "secret" character of the customer list seems even less convincing.

For its part, AFNY presents a number of items of evidence to show that the identity of its customers is a trade secret. Wayne Price testified that the customers had been accumulated over AFNY's forty-year history, see Dep. of Wayne Price at 15, and also that AFNY spends $15,000 and 100 person-hours annually on advertising, see Ex. 1, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J., AFNY's Responses to

Interrogatories, at 10. AFNY gets its customers through both advertising and referrals, see Dep. of Wayne Price at 15; Aff. of Wayne Price ¶ 4. Wayne Price also avers that the identity of producers is known, inside AFNY, only to Wayne Price and Mary Price, see Ex. 1, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J.; AFNY's Responses to Interrogatories at 9. In light of this evidence, and because, as noted above, Mountbatten's arguments with respect to this have not proven dispositive, we find that there remain issues of material fact as to whether AFNY's customer list is a trade secret.

Moving on, we next must consider whether, on the evidence before us, a reasonable jury could find that Mountbatten misappropriated the customer list. No such claim survives here. We have above concluded that based on the evidence properly before us for consideration, there is nothing in the record upon which a jury could reasonably base a finding that Mountbatten solicited any of AFNY's clients. This solicitation claim is also central to the misappropriation of trade secrets claim because such solicitation is exactly the wrongful use of the list that Mountbatten is alleged to have made. Since there is no evidence by which a reasonable jury could conclude that solicitation occurred, the misappropriation of trade secrets claim must fail.

We will therefore grant summary judgment to Mountbatten on Count III of AFNY's Third Amended Counterclaims.

5. Tortious Interference with Contractual Relations and

Prospective Contractual Relations

To maintain an action for interference with existing or prospective contractual relations, a party must allege: (1) the existence of a contractual, or prospective contractual relation between the complaintant and a third party, (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring, (3) the absence of a privilege or justification on the part of the defendant, and (4) damages resulting from the conduct, see, e.g., Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa. Super. 1998); Triffin v. Janssen, 626 A.2d 571, 574 (Pa. Super. 1993), appeal denied, 639 A.2d 32.

AFNY's allegations that Mountbatten interfered with AFNY's contractual relations and prospective contractual relations have two distinct sub-parts: (1) AFNY alleges that Mountbatten interfered with its existing and prospective relations with its producers whose accounts AFNY placed with Mountbatten, and (2) AFNY alleges that Mountbatten interfered with AFNY's existing and prospective relationship with F&D. As these allegations arise from distinct facts, we will deal with them separately.

a. AFNY's Producers and Accounts

AFNY's allegations here rest on the idea that Mountbatten interfered with AFNY's existing and prospective relationships with its producers by soliciting those producers.

Given our findings above with respect to Mountbatten's alleged solicitation of AFNY's producers and accounts -- to wit, that no reasonable jury could so find on the record before us -- we must similarly find that on the record before us, no reasonable jury could find that Mountbatten interfered with the contractual relationships or prospective contractual relations between AFNY and its producers and accounts.[76] We therefore will grant summary judgment to Mountbatten on Count IV and Count V of AFNY's Third Amended Counterclaim insofar is it involves interference with relations and prospective relations between AFNY and its producers and accounts.

b. F&D

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[76]Mountbatten also argues that there is no evidence that there were in fact contractual relations extant between AFNY and its producers. Mountbatten's interrogatory number 19 asked for "all producers who would place their accounts with Mountbatten through AFNY with whom AFNY maintained a contractual relationship." Ex. 1, Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. at 10. In response, AFNY first asserted general objections of trade secret privilege, Mountbatten's equal access to the material, and vagueness and ambiguity, and then responded that "AFNY does not regularly enter into contracts with producers because generally, that is not the regular practice in the industry." Id. at 10. However, in response to Mountbatten's argument that no contracts existed, AFNY cites deposition testimony by Wayne Price that AFNY in fact entered into oral contracts with its producers, see Dep. of Wayne Price at 120-21, Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 29.

As Mountbatten's interrogatory was not limited by its terms to written contracts, instead simply using the formulation "contractual relations" used in the cause of action, it is difficult to see how we might reconcile these contrary representations from AFNY. We need not tackle this conundrum, however, since, as discussed in the text, the absence of proof of any solicitation forecloses liability for Mountbatten on this claim.

AFNY claims that Mountbatten interfered with its contractual relationship and prospective contractual relationship with F&D. To assess these allegations, given the somewhat tangled relationship between AFNY, Mountbatten, and F&D, it is necessary first to rehearse, in come detail, the particular facts regarding the relationship between AFNY and F&D.

By a letter dated August 6, 1998, Mountbatten informed its agents that it had been acquired by F&D. This letter stated that this acquisition gave Mountbatten the ability to write bonds in all fifty states,[77] while it gave F&D access to a new segment of the bond market, see Ex. A, Supplemental Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. After the acquisition, AFNY submitted bonds to Mountbatten that were ultimately written through F&D because they involved territory in which Mountbatten was not licensed, see Dep. of Wayne Price at 143. At this time, AFNY did not have any direct contacts with F&D, see id. at 144, and in October 1998, Rochelle Musto of Mountbatten informed AFNY that AFNY would have to go through Mountbatten to communicate with F&D, see Dep. of Wayne Price at 156. Between September, 1998 and December, 1998, AFNY issued five F&D bonds through Mountbatten, see Ex. 5, Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. During this period, the decision

[77]Evidently, sureties have to be licensed to issue bonds in a particular state, and Mountbatten itself was only licensed in certain states.

on whether to submit a bond through to F&D was Mountbatten's, see Dep. of Wayne Price at 158.

In late October and early November, Mountbatten and F&D staff members corresponded regarding the issuance of F&D powers of attorney to AFNY, see Exs. 2 & 3, Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. These powers would allow AFNY to execute bonds on behalf of F&D, see Dep. of Wayne Price at 153. On December 18, 1998, F&D issued AFNY a power of attorney, along with various corporate supplies such as stamps and seals, that allowed AFNY to execute certain of F&D's bonds, see Ex. D, Supplemental Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J.; however, the power of attorney gave no discretionary authority and consequently each bond had to be specifically approved by F&D, see id., see also Dep. of Wayne Price at 147-48. Even once the power of attorney was provided, however, AFNY's contact with F&D was solely through Mountbatten, see Dep. of Wayne Price at 161-63.

On January 4, 1999, F&D and AFNY signed an agency agreement, which was by its terms effective on December 18, 1998, see Ex. E, Supplemental Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J. (the "F&D Agreement"). Even after signing this agreement, AFNY continued to make all bond submissions and communications through Mountbatten because of Mountbatten's prior representation that all communications to F&D had to go through it, see Dep. of Wayne Price at 161-63.

In approximately January, 1999, Tom Kay of Mountbatten and Tyrone Smith of F&D engaged in a telephone conversation in which Kay stated that Mountbatten intended to terminate its agency agreement with AFNY. During this conversation Kay also inquired of Smith whether Kay should request that AFNY return F&D supplies and powers of attorney, in addition to those of Mountbatten, see Dep. of Tyrone Smith at 40-42. Smith replied that Kay should request the return of such supplies, because he saw no reason for AFNY to continue holding them since Mountbatten was the entity that had asked that they be issued in the first place, see Dep. of Tyrone Smith at 40-43. Thereafter, by a letter dated January 19, 1999, Mountbatten announced it was terminating its agency agreement with AFNY, and in that same letter Mountbatten requested that AFNY return all of the F&D materials it held, to include both powers of attorney and other supplies needed to execute bonds, see Ex. F, Supplemental Mem. of Law in Supp. of Mountbatten's Mot. for Summ. J.

Thereafter, on February 2, 1999, Stacey Klogy-Deal of Mountbatten faxed to Tyrone Smith copies of the documents by which Mountbatten had informed AFNY of the termination of the Mountbatten Agreement, see Ex. 7, Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J., and by a letter dated February 25, 1999, Carole Sheridan of Mountbatten informed Tyrone Smith that Mountbatten had terminated AFNY for convenience and inquiring whether the F&D supplies that had been returned should

be sent to Smith, see Ex. 8, Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J.

On March 11, 1999, Tyrone Smith e-mailed Sue Rogers of F&D, with a copy to Robert Miedema of F&D, stating that AFNY had been appointed as agent at the request of Mountbatten, that he (Smith) had been advised that Mountbatten had canceled AFNY's agency appointment, that AFNY's powers of attorney had been revoked, and that F&D was also canceling AFNY's appointment, see Ex. 9, Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J.[78] During the entire period under discussion, and including the bonds written through Mountbatten, AFNY handled a total of eight bonds F&D wrote, see Dep. of Wayne Price at 157.

AFNY argues that the contacts between Mountbatten and F&D regarding AFNY's termination constitute Mountbatten's interference with existing and prospective contractual relations.

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[78]AFNY seeks to characterize this e-mail as a statement that F&D had in fact terminated the Agreement with AFNY on January 19, 1999, at the same time that Mountbatten had terminated AFNY, and sets this out as proof that Mountbatten had interfered with the F&D/AFNY relation with the January 19, 1999 letter. Our duty to take all inferences in favor of the plaintiff at this stage notwithstanding, this interpretation of the e-mail is completely unfounded. The operative language of the e-mail is "I've been advised by Mountbatten that they've canceled their appointment with [AFNY] and I've just sent notice to [AFNY] that F&D is also canceling their appointment/contract. The powers of attorney have been revoked and company supplies are in the process of being returned to us as Mountbatten collected ours at the same time they collected theirs." Ex. 9, Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. Far from confirming that the January 19, 1999 letter had terminated the F&D Agreement, the e-mail confirms that F&D saw the return of supplies as distinct from any termination, since they are clearly separated in time.

In seeking summary judgment on these claims, Mountbatten argues both that there was no actual contractual relationship between F&D and AFNY and that in any event Mountbatten's communications and behavior with respect to the AFNY/F&D relationship were not improper.

Mountbatten claims that AFNY had no contractual relationship with F&D because it is undisputed that AFNY did not communicate directly with F&D. Instead, at all times Mountbatten was an intermediary between AFNY and F&D. We do not find this argument meritorious. However the communications between AFNY and F&D may have been constituted, it is undisputed that there was an agency agreement extant between AFNY and F&D. This contract is solely between those two entities, and Mountbatten neither is a party to the contract nor is mentioned anywhere in that document. The form and content of this contract differ from the Mountbatten Agreement as well,[79] further demonstrating that it is something distinct from AFNY's contract with Mountbatten. In light of this written contract, we cannot accept the claim that no contractual relationship existed.

Similarly, Mountbatten argues that we may conclude on the undisputed facts that AFNY had no prospective contractual relations with which Mountbatten could have interfered, and Mountbatten points in particular to the undisputed evidence that

[79]While both appear to be form contracts and contain similar sections, their language and organization differ materially.

AFNY had handled very few bonds from F&D and that AFNY had no close business relationship with F&D.

> Defining a "prospective contractual relation" is admittedly problematic. To a certain extent, the term has an evasive quality, eluding precise definition. It is something less than a contractual right, something more than a mere hope. . . . "This must be something more than a mere hope or the innate optimism of the salesman."

Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979) (quoting Glenn v. Point Park College, 272 A.2d 895, 898-99 (Pa. 1971)). Ultimately, it must be that but for the wrongful acts of the defendant, it is reasonably probable that prospective relationship would have existed, see id.

Here, AFNY had an agency contract with F&D. This contract had no fixed term, and thus could have continued indefinitely -- Wayne Price testified that his relationships with sureties typically lasted for between ten and twenty years, see Dep. of Wayne Price at 187. Also, even absent an extant agreement with Mountbatten, AFNY could have independently submitted business to F&D, see Dep. of Tyrone Smith at 35. On the other hand, the contract contained a provision allowing termination for convenience by either party, see F&D Agreement ¶ 21, and, as discussed above, it seems that F&D entered into the Agreement as an offshoot of Mountbatten's work with AFNY. Upon consideration of these circumstances, and the standards elaborated above, we cannot find that we can state conclusively that there was no prospective contractual relation. AFNY's prior

experiences with sureties and the open-ended nature of the contract could allow a reasonable jury to find that AFNY had more than a "mere hope" of continuing to do business with F&D.

We thus come to the second of Mountbatten's arguments, i.e., that its behavior with respect to the relation between F&D and AFNY was not improper.

> In determining whether an actor's conduct in intentionally interfering with an existing contract or a prospective contractual relation is improper or not, consideration is given to the following factors:
> (a) The nature of the actor's conduct,
> (b) The actor's motive,
> (c) The interests of the other with which the actor's conduct interferes,
> (d) The interests sought to be advanced by the actor,
> (e) The proximity or remoteness of the actor's conduct to the interference and
> (f) The relations between the parties.

Triffin v. Janssen, 626 A.2d 571, 574 (Pa. Super. 1993) (quoting Restatement (Second) of Torts § 767, see also see Alder, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175, 1183 (Pa. 1978), cert. denied 422 U.S. 907 (1979) (endorsing the use of the Restatement (Second) of Torts in analyzing intentional interference with contractual relations).

Substantial deference is due to defendants "whose conduct, despite its conflict with plaintiff's interest, protects an existing legitimate business concern. . . . [W]here an actor is motivated by a genuine desire to protect legitimate business interests, this factor weighs heavily against finding an improper interference." Windsor Sec., Inc. v. Hartford Life Ins. Co., 986

F.2d 655, 665 (3d Cir. 1993) (canvassing Pennsylvania law and three prior Third Circuit opinions). On the other hand, where a defendant has influenced another's contractual relations with a plaintiff not to protect a legitimate business interest but rather to help the other aggrandize, there is no privilege to interfere, see Shared Communications v. Bell Atlantic, 692 A.2d 570, 575 (Pa. Super. 1997).[80]

Here, there are a relatively few acts by Mountbatten that are alleged to have constituted the interference. First, Mountbatten in October 1998 told AFNY to communicate and deal with F&D only through Mountbatten. Second, Tom Kay of

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[80]Two of the Third Circuit cases canvassed in Windsor Securities, which were also examined by the Shared Communications court, are cited and discussed at length by Mountbatten in support of its claim that its behavior was proper. These cases are Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) and Green v. Interstate United Management Servs. Corp., 748 F.2d 827 (3d Cir. 1984). These cases involved alleged interference by a corporate parent in a contractual relationship of a subsidiary, and in each the court found that the alleged interference was justified because the corporate parent was acting to prevent financial harm to the subsidiary and, consequently, itself, see Advent, 925 F.2d at 673, Green, 748 F.2d at 831. Mountbatten argues that these cases mandate that we reach a similar result, because, where AFNY was submitting all bonds to F&D through Mountbatten, Mountbatten's legitimate interest in terminating its own relationship with AFNY necessarily required a similar termination for F&D.

We do not see how these cases compel the result Mountbatten desires. First, the situation here is distinct in that the subsidiary is alleged to have interfered with the parent's relations, and this difference results in a different alignment of interests. Also, it is difficult to see what potential harm to Mountbatten – or to F&D, for that matter -- may have been forestalled by the termination of the AFNY/F&D relationship. Thus, while we take the holdings in these cases for their broad teaching, as noted in the text, we find the instant factual circumstances are sufficiently different to prevent us from following Green or Advent as such.

Mountbatten called Tyrone Smith of F&D to inquire whether Mountbatten should ask for F&D's supplies back from AFNY when Mountbatten gave notice of its termination. Third, in the January 19, 1999 letter to AFNY informing AFNY of the termination, Mountbatten did in fact request the return of F&D's supplies. Fourth, Mountbatten wrote Tyrone Smith to ask what should be done with the F&D materials that had been returned to Mountbatten by AFNY.

After careful consideration, we find that, even taking all inferences for AFNY, these acts by Mountbatten do not constitute interference with existing or contractual relations. First, the record is bereft of any evidence that shows that Mountbatten advocated to F&D the termination of the F&D Agreement.[81] Most of the communications and conversations that AFNY cites as constituting interference regard the powers of attorney and other supplies whose return was requested by Mountbatten after discussion with F&D. It does not appear disputed that the return of such supplies prevented AFNY from executing bonds on behalf of F&D, though the powers of attorney that AFNY held required it to have express permission to execute

[81]AFNY argues that the telephone conversation between Tom Kay of Mountbatten and Tyrone Smith of F&D showed Mountbatten to be advocating F&D's termination of AFNY, see Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 10. As we find, as detailed in the text, that return of the supplies in no way constituted a termination of the F&D Agreement, we can find no evidence whatever about this phone conversation in the record to support the claim that Mountbatten then advocated AFNY's termination.

any particular bond. There is thus no question that the request for the return of the supplies and powers of attorney made it less convenient for AFNY to do business for F&D.

But did that request interfere with the contractual relations between F&D and AFNY? Wayne Price stated that he interpreted the January 19, 1999 letter from Mountbatten to also terminate the agreement with F&D, despite the lack of express language to that effect, because the letter requested the return of the F&D supplies, see Dep. of Wayne Price at 166-68. But this interpretation is belied by the clear language of the agreement between F&D and AFNY. Paragraph 15 of the F&D Agreement states in part:

> Bond and policy forms, maps, rate books, powers of attorney, corporate seals, and other like Company supplies furnished to Agent by Company shall remain the property of Company, and shall be returned to Company or its representatives promptly on demand. Such demand or return shall not be construed as a cancellation of this Agreement.

F&D Agreement ¶ 15.

It can consequently not be disputed that the F&D Agreement, by its own terms, remained in full force and effect notwithstanding the request for return, and the actual return, of the supplies. We can find it of no moment that Wayne Price of AFNY interpreted the effect of such return differently when the clear and unambiguous language of the Agreement states otherwise. Moreover, to the extent that after the return of the supplies AFNY was unable to execute bonds for F&D, the parties have not

cited to us, nor have we been able to locate, any provision of the F&D Agreement stating that AFNY would have such powers of execution.

It is difficult indeed, then, to see how the actions by Mountbatten surrounding the return of the supplies could amount to an interference with the contract. There is no argument here that there existed any other contract, oral or written, between the parties that might have been interfered with by these actions, and, in any event, the Agreement states that "[t]his Agreement supersedes all previous Agreements, oral or written, between Company and Agent." F&D Agreement ¶ 21.[82]

We are thus left with the direction from Mountbatten to AFNY in October 1998 directing AFNY to communicate with F&D only through Mountbatten. We first note that this "order" was given not only prior to the F&D Agreement but also prior to the issuance of F&D powers of attorney to AFNY. The parties have not cited for us, nor have be been able to locate in the record, any reference to a renewal of that direction post-dating October, 1998, see, e.g., Dep. of Wayne Price at 156 (stating that "[w]e were advised by the underwriter that we could not deal with F&D directly but had to deal through Mountbatten" and attributing

[82]It is appropriate to note that Mountbatten did not explicitly make the argument regarding paragraph 15 of the Agreement in its pleadings. Nonetheless, we find the question squarely before us, as the elements of this tort require that the actions be taken with the intent of harming the contractual relation. The question of whether the acts alleged here meet that standard is obvious. Mountbatten addresses its arguments primarily to its justification in acting as it did.

this to a statement by Rochelle Musto of Mountbatten in October 1998). Thus, we are unclear how Mountbatten's statement could interfere with a contractual relationship that was established some three months later.[83] Moreover, it would seem equally to beggar belief that such direction by Mountbatten could have interfered with the AFNY/F&D relationship or prospective relationship once Mountbatten terminated its own Agreement.[84] With Mountbatten out of the picture, it is again hard to see how a reasonable jury could find that the months-old statement could interfere with the still-extant relationship between AFNY and F&D.[85]

We therefore find that no reasonable jury could find on the facts before us that Mountbatten tortiously interfered with the contractual relations and prospective contractual relations

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[83]In fact, it would seem to us that taking AFNY's argument at face value, we would have to conclude that Musto's statement in October 1998 standing by itself immediately constituted an interference with AFNY's prospective contractual relationship with F&D, "preventing" as it did dealings between those two entities. Our finding above prevents this nonsensical result.

[84]We do note that Wayne Price never once communicated with F&D directly about any of the events surrounding the termination, nor was he aware of any such communications by Mary Price, the other AFNY principal, see Dep. of Wayne Price at 169.

[85]We do recognize that it is part and parcel of AFNY's view of the facts that the F&D Agreement was in fact terminated on January 19, 1999. At the same time, though, AFNY argues that Mountbatten's correspondence regarding the F&D supplies of February 1999 constitute a continuing interference, see Supplemental Mem. of Law in Opp'n to Mountbatten's Mot. for Summ. J. at 10, and thus we find it significant that it would seem inconsistent to claim that Mountbatten's statement interfered with the F&D Agreement after Mountbatten had departed the scene.

between AFNY and F&D. We will therefore grant summary judgment to Mountbatten on Count IV and Count V of AFNY's Third Amended Counterclaim insofar as they involve interference with relations and prospective relations between AFNY and F&D.

C. AFNY's Counterclaims Against F&D

AFNY's Third Amended Counterclaim asserts claims against F&D of misappropriation of trade secrets (Count III), tortious interference with contractual relations (Count VI), and tortious interference with prospective contractual relations (Count VII). These claims are based on the general allegations that F&D wrongly used the list of producers that AFNY disclosed to Mountbatten and that F&D had interfered with the relationship between AFNY and Mountbatten. F&D here seeks summary judgment on these claims, arguing that discovery has revealed no evidence to support these claims.

AFNY concedes that these claims are not supported by the evidence uncovered during discovery.[86] We will therefore grant summary judgment for F&D on Count III, Count VI, and Count VII of AFNY's Third Amended Counterclaim.

[86]As noted at the outset, following discovery AFNY sought to amend its counterclaims with respect to F&D to delete all the extant counterclaims and replace them with a single count of breach of contract, as it averred that this was the allegation found to be supported by the evidence. We denied AFNY leave to so amend the counterclaim on the basis that the breach of contract claim was unduly delayed, since the information upon which it was based had long been in AFNY's possession. Consequently, we arrived at this stage with counterclaims against F&D remaining that AFNY had already essentially sworn off. This is the reason for its concession in the pleadings here.

D. F&D's Counterclaims Against AFNY

F&D has counterclaimed against AFNY, alleging breach of contract (Count I), conversion (Count II), and unjust enrichment (Count III), based on claims that AFNY failed to remit to AFNY net premiums that were owed for F&D bonds issued through AFNY under the F&D Agreement. F&D now moves for summary judgment, and AFNY does not dispute that it has withheld premiums from F&D, see Dep. of Wayne Price at 95-96.

Before we begin the analysis, we must address a question of choice of law. In its reply brief, F&D asserts for the first time[87] that Pennsylvania law does not govern the F&D Agreement. F&D does not make a positive claim about what state law in fact applies,[88] although it does cite to a case from the Southern District of New York on the question of the extent of the implied covenant of good faith and fair dealing in New York. AFNY's arguments against summary judgment are all based on Pennsylvania law,[89] and with the exception of the point of law noted above, F&D does not assert New York law to contravene any argument that AFNY makes under Pennsylvania law. As at summary

[87]Notably, F&D cited no state case law whatever in its motion for summary judgment.

[88]F&D concludes that Pennsylvania law doesn't apply because F&D is in Maryland and AFNY is in New York, but does not conduct any analysis using choice of law rules to demonstrate whose law applies, or indeed to show that Pennsylvania law does not.

[89]Thus demonstrating AFNY's implicit assumption that Pennsylvania law applies.

judgment we take inferences for the non-movant, we will assume for the purposes of this motion that Pennsylvania law does in fact apply, as AFNY maintains, and conduct our analysis accordingly.

1. Breach of Contract

AFNY does not dispute the existence of the contract whose provisions required AFNY to remit premiums, nor that AFNY has in fact withheld premiums from F&D. F&D has moved for summary judgment on these facts.

In response to F&D's motion for summary judgment on the breach of contract claim, AFNY presents arguments similar to those raised against Mountbatten's claim of breach of contract. First, AFNY argues that F&D materially breached its agreement by allowing Mountbatten, in the January 19, 1999 letter, to wrongfully terminate the F&D Agreement by requesting the return of F&D supplies. Second, AFNY argues that F&D materially breached the Agreement because the letter notice of termination of March 12, 1999 was improper because it immediately terminated the Agreement rather than allowing the contractually-required ninety-day period. Third, AFNY argues that F&D materially breached the implied covenant of good faith and fair dealing in its manner of terminating the contract. Last, AFNY avers that F&D had waived its ability to enforce the payment provision of the contract, and thus cannot now compel AFNY to adhere to such provision strictly.

a. F&D's Alleged Breach of the Agreement's Termination Provision

We begin with AFNY's claims that F&D materially breached the Agreement first, thus foreclosing its enforcement of the contract.[90] AFNY first argues that F&D breached the Agreement by providing improper notice of termination. The F&D Agreement states:

> This Agreement and/or any Specific Authorization may be terminated by either party at any time upon ninety (90) days written notice, or the required statutory notice, if it be longer, to the other.

F&D Agreement ¶ 21. AFNY argues that F&D allowed Mountbatten to terminate the F&D Agreement in the January 19, 1999 letter, because following the receipt of the letter and the return of the F&D supplies requested in the letter, AFNY was required to have special approval for certain bonds and that it was unable to get bonds for certain existing accounts.

As discussed at length above, we have found that the F&D Agreement was not terminated by the January 19, 1999 letter from Mountbatten, because under paragraph 15 of the F&D Agreement the return of supplies did not constitute termination. Also as discussed above, the F&D Agreement does not contain any provision requiring F&D to issue bonds solicited by AFNY. Thus, these actions as such cannot constitute a breach by F&D.

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[90]For a statement of the law associated with breach of contract, refer to our discussion above in the context of Mountbatten's alleged breach.

AFNY also argues that the January 19, 1999 letter breached the F&D Agreement because without Mountbatten in the picture, AFNY could no longer write business with F&D since all of AFNY's dealings with F&D were through Mountbatten. On top of this, AFNY avers, no one from F&D or Mountbatten told AFNY that it could exercise its rights under the F&D Agreement independent of Mountbatten's involvement. Consequently, for F&D to have allowed the January 19, 1999 letter to issue and to have condoned the subsequent confusion in which AFNY was left constitutes a breach of the Agreement's termination provision.

Here again, we simply cannot see how the complained-of behavior could make out a claim of a material breach by F&D of the termination provision. Nothing in the January 19, 1999 letter said anything about F&D outside of the return of F&D supplies. Taking inferences in its favor, AFNY's principals evidently made some assumptions about the meaning of the Mountbatten termination, namely that if Mountbatten was terminating, F&D must be terminating, too. Based on this assumption, and the fact that the avenue used up to that point for transacting with F&D -- Mountbatten -- was no longer associating with AFNY, AFNY assumed, in the absence of direct communications stating otherwise from F&D and Mountbatten, that the F&D Agreement was terminated, in violation of the contractual provision. Assuming all this to be true, it does not amount to F&D’s material breach of contract. There is no evidence that anyone from F&D told AFNY that the Agreement was terminated, and

AFNY evidently made no effort to contact F&D to ascertain that it could still write under the F&D Agreement, as noted above. The record before us, therefore, would not permit a reasonable jury to find that F&D's actions with respect to Mountbatten's January 19, 1999 letter constituted a breach of the F&D Agreement's termination provision.

Next, AFNY argues that F&D's letter of March 12, 1999, which announced that the Agreement would be terminated ninety days thence, was itself in contravention of the termination provision of the Agreement. This letter stated that during the ninety day period, "our company will not be accepting any new business, but will continue to service existing accounts handled through your agency." Ex. G, Mem. of Law in Opp'n to F&D's Mot. for Summ. J. AFNY argues that because the termination provision does not contemplate the refusal to accept new business, this statement in the letter constitutes a material breach of the termination provision. As noted above, however, this Agreement, like the Mountbatten Agreement, is very limited in its provisions: it gives AFNY the authority to "solicit and receive applications", to "collect, receive, and receipt for premiums" and to retain a commission from the premiums received. F&D Agreement at 1. The Agreement does not authorize AFNY to bind F&D, and does not contain any representation that F&D will issue any particular bond. Thus, to the extent that the March 12, 1999 letter established a more limited relationship between AFNY and

F&D than had existed previously, this was in no way a breach of the very limited agency agreement to which they were parties.[91]

[91]AFNY takes notice of a deposition statement by Tyrone Smith of F&D to the effect that it was his understanding that had AFNY submitted new business to F&D's "Metro" branch (which serviced New York) during the ninety day period following March 12, 1999, such business could have been approved. AFNY argues that the difference between this statement and the language of the letter creates an issue of material fact regarding F&D's breach. To the extent that this is a dispute of fact, it is not material where the more restrictive reading -- that no new business would be accepted -- is not a breach.

b. F&D's Alleged Breach of the Duty of Good Faith

AFNY next argues that F&D's actions with respect to AFNY's termination violated the Agreement's implied covenant of good faith and fair dealing. In particular, AFNY argues that such violation was evidenced by the following: (1) F&D acquiesced to Mountbatten's wrongful collection of the F&D supplies; (2) F&D, while the Agreement was in effect, improperly took back its powers and prevented AFNY from exercising its rights under the Agreement; (3) F&D was two months tardy informing AFNY about the termination that had actually occurred on January 19, 1999, and the late notice itself was defective; (4) the termination of March 12, 1999 did not provide the required ninety day notice; (5) F&D had waived the payment provisions of the Agreement, and it was consequently wrongful to enforce them.

Above, during our consideration of AFNY's claims that Mountbatten violated the implied covenant of good faith and fair dealing, we discussed this legal doctrine at length, and we will not repeat that analysis here. We concluded that it was by no means certain that such a covenant applied to agency contracts such as the F&D Agreement. Even if it did, however, F&D's actions would not constitute a breach. With respect to claims (1) through (4) outlined above, we have already concluded that the conduct alleged was not wrongful. AFNY has not pointed to anything about this behavior that would constitute a breach of the covenant of good faith and fair dealing outside of its

alleged wrongfulness in light of the Agreement. Where such wrongfulness does not exist, we cannot find a breach of the implied covenant of good faith and fair dealing.

With respect to item number (5) outlined above, regarding the issue of waiver, we will find below that there was nothing whatever wrongful in F&D's behavior associated with such waiver. We consequently find no resultant breach of the implied covenant of good faith and fair dealing.

c. F&D's Alleged Waiver of the Payment Provision

AFNY argues that, while paragraph 5 of the F&D Agreement requires AFNY to pay the net premiums to F&D within forty-five days after the end of the month for which the account current is rendered, F&D, in fact, waived this provision when it failed to send monthly statements to AFNY. The F&D Agreement requires the Agent to send the Company an "account current" each month stating, inter alia, premiums and adjustments from business conducted during the preceding month, see F&D Agreement ¶ 5. The Agreement goes on to state that "[t]he Company will render, to any Agent who does not submit an account current, a monthly statement of premiums covering all business written, renewed, or canceled during the preceding month." F&D Agreement ¶ 5.

AFNY argues that F&D did not send it a statement requesting payment of the premiums at issue until May 6, 1999, several months after the termination. AFNY also argues that its payments of premiums for F&D bonds were made through Mountbatten

-- indeed that F&D had never sent any bill prior to May 6, 1999 -- and Mountbatten accepted a course of performance in which AFNY paid after a delay of sixty to ninety days. Thus, claims AFNY, the payment provisions of paragraph 5 of the F&D Agreement are waived, and F&D cannot now step in and demand compliance.

We have above performed an analysis of waiver with respect to the Mountbatten Agreement, and we will not repeat here the legal analysis found there. As with AFNY's allegations of Mountbatten's waiver, we find here that there is no merit to AFNY's claims about F&D's waiver. No matter whether there was in fact an acceptance by F&D of a course of performance with respect to payment that differed from the contractual provisions[92], there is no suggestion here that F&D accepted a course of performance where AFNY was freed entirely from its obligation to pay. The statement of May 6, 1999 requesting payment was issued within the ninety day period following the March 12, 1999 letter, and it is now over eleven months since the statement issued. Moreover, F&D's counterclaim demanding payment for these premiums was filed on November 10, 1999, over six months after the statement date. F&D is therefore not here to enforce some particular "late payment" clause; instead, it is here to enforce AFNY's basic

[92]We note that we are not entirely certain what exactly this course of performance is alleged to be: is it the sixty to ninety day delay accepted by Mountbatten on behalf of F&D, or instead the evidently longer delay AFNY would seem to have us ascribe to F&D's failure to bill prior to May 6, 1999? As this discussion in the text shows, it makes no difference as to the outcome here.

obligation to pay. To the extent that AFNY posits its argument regarding waiver on the fact that F&D wrongfully terminated the Agreement either on January 19, 1999 or March 12, 1999, or any other time, we find that such wrongful termination did not occur. We thus find that there is no issue of waiver preventing summary judgment to F&D on its breach of contract claim.

There is no dispute here that AFNY withheld premiums from F&D. We have above rejected as legally unfounded AFNY's various claims that such behavior was justified. We therefore will grant summary judgment to F&D on Count I of its Counterclaims.[93]

2. Conversion

F&D has moved for summary judgment on its claim that AFNY converted the premiums at issue. Above, we explored the law of conversion at length in connection with Mountbatten's claim of conversion against AFNY, in particular that a plaintiff may not sue in tort for damages arising from a breach of contract. As the F&D Agreement parallels the Mountbatten Agreement, and AFNY's behavior with respect to withholding premiums is also congruent

[93]As Exhibit A to its motion for summary judgment, F&D has provided us with a copy of the statements of May 6, 1999 sent to AFNY detailing the premiums due on seven separate F&D bonds. The total of the net commissions reflected on these statements is $45,798.15. However, F&D filed an Amended Motion which reported that one of the bonds billed in the statements had in fact not issued and that consequently the total amount of premiums owing was in fact $35,606.15. AFNY has not filed a pleading disputing these amounts owed, and we have verified F&D's arithmetic, and so we will enter judgment in the amount of $35,606.15.

with respect to F&D and Mountbatten, we find, as we did above, that F&D's damages here arise from a breach of contract and therefore an action on conversion does not lie. We will therefore grant summary judgment to AFNY on Count II of F&D's Counterclaim.

3. Unjust Enrichment

"Unjust enrichment is a quasi-contractual doctrine based in equity; its elements include benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa. Super. 1999) (internal quotation marks omitted). "In order to recover under the doctrine of unjust enrichment, there must be: (1) an enrichment; and (2) an injustice resulting if recovery for the enrichment is denied. . . . In determining whether the doctrine applies, the most significant requirement for recovery is that the enrichment of the defendant is unjust." Chesney v. Stevens, 644 A.2d 1240, 1243 n.4. (Pa. Super. 1994).

Here, F&D has moved for summary judgment on the undisputed fact that AFNY has withheld premiums. In response, AFNY argues that summary judgment should not be granted because F&D materially breached the F&D Agreement prior to any wrongdoing by AFNY. Above, we have at length discussed F&D's behavior and

have found that F&D did not materially breach the Agreement and that in fact AFNY is liable for breach of contract. AFNY's defense consequently fails, as AFNY's retention of the premiums is wrongful, resulting from breach of contract. As the retention of premiums is wrongful, it would be unjust to deny recovery to F&D, and so on the undisputed facts, we will grant F&D summary judgment on Count III of its Counterclaim.

4. Interest and Attorney's Fees

Though it does not direct any arguments in its motion for summary judgment to these issues, in F&D's demand for relief on its counterclaims, it asks both for counsel fees and interest. As discussed above in conjunction with Mountbatten's request for market rate interest, a plaintiff has the right to prejudgment interest at the statutory rate on the moneys owed it under a contract. Having found above the F&D warrants summary judgment on its breach of contract claim against Mountbatten, it is appropriate also to award it simple prejudgment interest at the statutory rate.

The analysis is not so simple with respect to the request for attorney's fees, however. While the F&D Agreement does include an indemnification provision, see F&D Agreement ¶ 17, this provision indemnifies AFNY from F&D's actions, not the other way around.[94] We are therefore without any evidence that

[94]F&D's indemnification provision is thus exactly the reverse of the indemnification in the Mountbatten Agreement.

attorney's fees or costs arising from this suit are owed by AFNY to F&D, and we consequently will decline to award such fees.

III. Conclusion

There are no disputed issues of material fact in this overlawyered case. There is no dispute that AFNY withheld premiums from Mountbatten and F&D. Instead, the parties have differed on the question of whether such acts were legally justified. We have found that on the undisputed facts of the record before us, none of the justifications AFNY proffers is legally tenable.

We have also found, again on the undisputed facts of the record, that AFNY's counterclaims against Mountbatten and F&D are legally unfounded. We consequently shall enter judgment for F&D and Mountbatten and against AFNY.

An Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MOUNTBATTEN SURETY COMPANY, INC.	:	CIVIL ACTION
v.	:	
AFNY, INC.	:	
v.	:	
FIDELITY AND DEPOSIT COMPANY OF MARYLAND	:	NO. 99-2687

ORDER

AND NOW, this 11th day of April, 2000, upon consideration of Mountbatten Surety Company's ("Mountbatten") and Fidelity and Deposit Company of Maryland's ("F&D") motions for summary judgment, AFNY, Inc.'s ("AFNY") responses thereto, deemed to be cross-motions for summary judgment for the purposes of ¶¶ 3 and 8 herein, and Mountbatten's and F&D's replies thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Mountbatten's motion for summary judgment is GRANTED IN PART and DENIED IN PART in accordance with the Memorandum;

2. JUDGMENT IS ENTERED in favor of Mountbatten and against AFNY as to Count I of the Complaint in the sum of $129,887.50, together with simple prejudgment interest calculated at the statutory rate and attorney's fees;

3. JUDGMENT IS ENTERED in favor of AFNY and against Mountbatten as to Count II of the Complaint;

4. JUDGMENT IS ENTERED in favor of Mountbatten and against AFNY as to Counts I, II, III, IV, and V of AFNY's Third Amended Counterclaims;

5. F&D's motion for summary judgment is GRANTED IN PART and DENIED IN PART in accordance with the Memorandum;

6. JUDGMENT IS ENTERED in favor of F&D and against AFNY as to Counts III, VI, and VII of AFNY's Third Amended Counterclaim;

7. JUDGMENT IS ENTERED in favor of F&D and against AFNY as to Counts I and III of F&D's Counterclaim in the sum of $35,606.15, together with simple prejudgment interest calculated at the statutory rate;

8. JUDGMENT IS ENTERED in favor of AFNY and against F&D as to Count II of F&D's Counterclaim;

9. Mountbatten shall submit its petition regarding attorney's fees, and accompanying affidavit(s), by no later than ten days after this Order becomes final;

10. Mountbatten, F&D, and AFNY shall by April 21, 2000 submit their calculations of the appropriate amount of

prejudgment interest to be awarded so that we may amend ¶¶ 2 and 7 hereof appropriately; and

11. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.